

Lexington Cartage Company, Inc. and Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-15172

October 22, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On March 19, 1981, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lexington Cartage Company, Inc., Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to recognize and bargain in good faith with Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of our employees in the following appropriate bargaining unit:

All truck drivers employed by us at our Lexington, Kentucky, facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL recognize and, upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the above-described unit.

LEXINGTON CARTAGE COMPANY,
INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard in Lexington, Kentucky, on January 12, 1981, pursuant to an unfair labor practice charge filed by Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, on April 7, 1980, and a complaint and notice of hearing issued by the Regional Director for Region 9 of the National Labor Relations Board on May 23, 1980. The complaint alleges that Lexington Cartage Company, Inc., herein called Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, herein called the Act, by refusing to bargain in good faith with the Union, by not responding to telephone calls from the Union, by not responding to bargaining proposals, by canceling a negotiation meeting, and by withdrawing recognition from the Union.

On May 15, 1980, Respondent filed a petition with the Regional Director, which requested the Board to refrain from processing this matter on the grounds that the Union does not represent a majority of employees, and that a remedial order would deprive Respondent and its employees of their constitutional rights. On June 10, Respondent filed its answer to the complaint denying the commission of unfair labor practices, and therein also alluded to the aforesaid petition dated May 15, 1980, and further recited that it had instituted action in the United States District Court for the Eastern District of Kentucky seeking a declaratory order that it not be required to bargain with the Union and that the Union be enjoined from enforcing its bargaining demands.

On July 15, 1980, the said Regional Director referred Respondent's May 15 petition to the Chief Administrative Law Judge for ruling as a motion to dismiss pursuant to Section 102.25 of the Board's Rules and Regulations, Series 8, as amended. On the same date counsel for the General Counsel filed a motion in opposition to the motion to dismiss with supporting memorandum. The General Counsel argued therein that the complaint herein is premised upon an admitted refusal to recognize and bargain with the Union during the 1-year period wherein the Union was certified by the Board as collective-bargaining agent, and that, in the absence of any unusual circumstances, there can be no justification for said

refusal, citing *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954). Respondent's petition was treated by the Associate Chief Administrative Law Judge as a motion to dismiss which he denied on November 24, 1980.

It appears that all parties have intervened in the district court action where the matter is now pending. Respondent's petition to defer action was not thereafter renewed before me. Subsequent to the hearing in this matter, Respondent and the General Counsel filed briefs. Nowhere in argument or brief does Respondent set forth a cogent argument supported by case citation as to why the Board should or can cede to the district court its exclusive statutory jurisdiction over the alleged unfair labor practice. At no time did Respondent or employees file with the Board a petition to revoke certification. As stated by the Supreme Court in the above-cited *Brooks* case:

If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, *these are matters for the Board; they do not justify employer self-help or judicial interference.* . . . [348 U.S. at 103, emphasis supplied.]

Accordingly, I conclude that the processing of this case ought not be deferred.

Upon the entire record and the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a Kentucky corporation with an office and place of business in Lexington, Kentucky, has been engaged in the intrastate transporting of freight in and around Lexington. During the 12-month period preceding the complaint, Respondent, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of \$50,000, which were shipped to its Lexington, Kentucky, facility directly from points outside the Commonwealth of Kentucky.

It is admitted and I find that at all times material Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF THE LABOR ORGANIZATION

It is admitted and I find that the Union is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

On October 30, 1979, in Case 9-RC-12989, the Board issued a Decision and Certification of Representative

wherein it certified the Union as the exclusive bargaining representative of all employees in the following appropriate unit:

All truck drivers employed by the Employer at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On November 27, 1979, Union Business Agent Rex Edwards communicated by letter with Respondent wherein he requested a meeting on January 6, 1980, for the purpose of negotiating a collective-bargaining agreement. The first negotiation meeting occurred on January 18, 1980, between union representatives including Edwards and representatives of the parties including General Manager Frank Dean, Sr., and Attorney Robert Houlihan. Edwards submitted a proposed collective-bargaining agreement to Respondent's representatives who agreed to study them.

The next negotiating meeting occurred, on February 25, in Attorney Houlihan's office. At that meeting and at meetings held on March 6, 13, and 28, Respondent submitted to the Union no counterproposals orally or in writing. Rather, at each meeting commencing with the meeting of February 25, Houlihan stated that it was the position of Respondent that the Union did not represent a majority of the unit employees and therefore it was not obliged to bargain with the Union. Edwards testified that he responded that he would file unfair labor practice charges to compel bargaining. He conceded that he also threatened that the Union would engage in strike activity to compel negotiations. Arguments then were engaged in between Edwards and Houlihan as to whether the Union was required by its International constitution and Local bylaws first to conduct a strike vote before engaging in strike activities. No meetings were held after March 28.

Edwards testified that he had made numerous efforts to contact Respondent to arrange for meeting dates but that he was frustrated by the failure of Respondent to answer his messages, and by the unavailability of Attorney Houlihan. Edwards testified that on one occasion he appeared at Houlihan's office for an arranged meeting only to be informed that Houlihan was called away for other business. Edwards' testimony in this regard was confused, uncertain, cryptic, conclusionary, and not related to specific dates or events. He conceded on cross-examination that there were occasions when he was also unavailable for meetings. Edwards' testimony is too vague and uncertain to support any conclusions with respect to Respondent's failure to respond to telephone calls and with respect to the cancellation of one meeting.

General Manager Dean testified that a "short time" after the Union was certified on October 30, 1979, he was presented with a petition which bore the purported signatures of all the 14 unit employees then employed, and which stated, *inter alia*: "We the undersigned Petition Local 651 Teamsters Union to Drop their Effort to Organize the Drivers of Lexington Cartage Company." He also testified that he first became aware of such petition "sometime prior to" October 26, 1979, but he did not explain the circumstances nor did he fix a date.

Dean further testified that on October 18, 1979, he had observed and removed from the plant bulletin board a cartoon which had been extracted from *Hustler* magazine and which depicted two male persons, one of whom, a political candidate, was engaged in an act of lewd obeisance to the other, a potential voter. Handwritten on the cartoon was an identification of the two persons as General Manager Dean and employee truck-driver Roosevelt Coates (identified at the hearing as the distributor of the employee petition).

Dean concluded, after an investigation of handwriting samples later verified by a handwriting expert, that the handwritten portion was that of Thomas Mason. Dean assumed that, because he had seen Mason in possession of that particular issue of *Hustler* containing the cartoon shortly before the posting occurred, Mason was responsible for the actual posting. Dean testified without elaboration that during the preelection campaign Mason was "visible as the in-plant union organizer." Also Mason appeared at the National Labor Relations Board Regional Office in the company of the union agent for the scheduled representation case hearing which however was aborted because of a voluntary election agreement. Additionally, Mason served as the observer for the Union at the Board-conducted election.

Mason was discharged on October 26, 1979, without further investigation. The Union was notified by letter of his discharge. No unfair labor practice charge was filed concerning his discharge. Respondent attempted to elicit testimony from Dean as to his opinion of the impact of Mason's discharge on the employees' mental attitude regarding continued union representation. Objection to that inquiry was sustained, *inter alia*, on grounds that Dean was not competent to testify as to the employees' state of mind.

On or about March 9, 1980, according to Dean, a second petition was shown to him, dated March 9, containing the apparent signatures of all unit employees which was addressed "To the Teamsters" and which stated:

We the Drivers of Lexington Cartage Co. Hear You Are Still Trying To Negotiate for us. We Do Not Want You To Do This. We Do Not Want Your Union. We Want You To Leave Us Alone.

Like the first petition, Dean testified that the second petition was presented to him by a group of three or four employees.

Truckdriver Roosevelt Coates testified that he prepared, with his wife's clerical help, both of the employee petitions described above. He testified that he solicited each employee to sign the petitions. With respect to the first petition he testified that he encountered some employee resistance, but that *after* Mason was discharged he "didn't have a bit of trouble" obtaining signatures. Coates identified Mason as the "one who tried to organize," and stated that Mason's discharge "cut the head off" the organizing drive. Coates testified that he delivered both petitions to the Union. He further testified that shortly after the second petition the employees all "voted" at the union hall to renounce further union rep-

resentation, and that no strike vote was ever conducted by the Union. Coates did not disclose precisely when a majority of employees signed the petition, nor did he disclose the circumstances.

For reasons set forth below, I granted a motion to strike, as irrelevant, Dean's testimony as to the receipt of the employees' petitions and Mason's discharge. Coates' testimony was received as an offer of proof, as I ruled at the hearing, that the substance of his testimony was also irrelevant.

B. Analysis

Respondent argues that, despite the fact that its admitted refusal to recognize and bargain with the Union occurred during the certification year, it was justified in so doing because of unusual circumstances. These circumstances consist of Respondent's belief that the employees renounced the Union because of the opprobrious conduct of the leading employee union adherent who it also expected was "slated" to become a shop steward.¹ Respondent contends that the employees' reputed desires should be honored and that a bargaining order based on a presumption of majority status would be contrary to the employees' rights under the Act and an abridgement of their first amendment right of freedom of association.²

Although Respondent contends that the Union is responsible for the conduct of Mason, a contention I find untenable, Respondent does not argue that the circumstances herein give rise to such a degree of union misconduct as to obviate the possibility of a viable relationship at the bargaining table.³ Indeed, there was no evidence offered to demonstrate that the Union adopted or approved of Mason's conduct, or that it even requested that he be reinstated. Rather, Respondent sought to adduce evidence of Mason's purported conduct solely to establish employee motivation for its alleged disavowal of the Union.⁴

The issues raised herein by Respondent have long been resolved. The Board has explicitly stated:

It is well settled that a Union's continued majority is conclusively presumed to exist for 1 year from the date of the certification and such an employee

¹ No evidence was sought to be adduced that Mason was "slated" to be a shop steward. He was discharged prior to any bargaining and was not a member of the Union's bargaining team.

² At the hearing Respondent explicitly disclaimed that its refusal to bargain was in any way premised upon the threat of the Union to engage in strike activity.

³ Where a union has engaged in a campaign of extensive and egregious violence directed against an employer the Board has refused to require a bargaining order. *Union Nacional de Trabajadores and its agent Arturo Grant (The Carborundum Company of Puerto Rico and Carboundum Caribbean, Inc.)*, 219 NLRB 862 (1975); *Allou Distributors, Inc.*, 201 NLRB 47 (1973); *Herbert Bernstein, Alan Bernstein, Laura Bernstein, a copartnership d/b/a Laura Modes Company*, 144 NLRB 1592 (1963).

⁴ It can be argued that Respondent's proffered evidence in this regard does not demonstrate that the employees' disapproval of Mason's alleged conduct motivated their change of loyalty, but rather that it was the fact that the chief union adherent was discharged which caused them to cooperate with Coates' antiunion efforts. Respondent's proffered evidence does not establish that the employee petition was executed by most employees after the cartoon posting but before Mason's discharge.

petition does not constitute "unusual circumstances" within *Ray Brooks v. N.L.R.B.*, 348 U.S. 96 (1954).⁵

In no case has the Board or the courts evaluated the motivation of employees' subsequent change of mind as an unusual circumstance. Indeed, the goal of industrial stability sought to be achieved by the Board as affirmed by the Supreme Court would be frustrated if a Board certification based on a secret-ballot Board-conducted election could be speedily nullified by the informal mechanism of an employee-conducted petition. This is so particularly in the instant case where the motivations of the employees are speculative, and where the subsequent petition and renunciations occurred after Respondent refused to recognize its bargaining obligations and thereby frustrated effective bargaining by the Union.⁶

Accordingly, I reaffirm my ruling made during the course of the hearing that the evidence proffered by Respondent as to the Union's loss of employee support during the certification is irrelevant and inadmissible.⁷ I conclude that Respondent has failed to adduce relevant, competent, and probative evidence to establish the existence of extraordinary circumstances to justify the withdrawal of recognition from the Union. I find that Respondent breached its bargaining obligations under the Act and failed to bargain collectively and in good faith with the Union, and violated Section 8(a)(5) and (1) of the Act on and after February 25, 1980, by failing to respond to the Union's bargaining proposals, and by withdrawing recognition from the Union as the exclusive bargaining agent of employees in the appropriate bargaining unit.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above occurring in connection with its operations described above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

I recommend that Respondent be ordered to cease and desist from its unfair labor practices and to take certain affirmative action designed to effectuate the policies of the Act.

⁵ *Affordable Inns, Inc. d/b/a Regal 8 Inn*, 222 NLRB 1258 (1976). The Board therein cited *Cocker Saw Company, Inc.*, 186 NLRB 893 (1970), enf'd. 446 F.2d 870 (2d Cir. 1971); and *Williams Energy Company*, 218 NLRB 180 (1975). See also *Kenneth B. McLean, d/b/a Ken's Building Supplies*, 142 NLRB 235 (1963), 333 F.2d 84 (6th Cir. 1964); *Lee Office Equipment*, 226 NLRB 826 (1976), enf'd. 572 F.2d 704 (9th Cir. 1978), and cases cited therein.

⁶ This is not to say that an employer or employees are not without recourse to the Board processes at the appropriate time. After the expiration of the certification year employees and the employer may file new representation petitions. Under certain circumstances the Board will entertain petitions for revocation of certification during the certification year; e.g., defunction of the Union or radical change in the bargaining unit.

⁷ See *N.L.R.B. v. American Steel Buck Corporation*, 227 F.2d 927 (2d Cir. 1955), enf'd. 110 NLRB 2156 (1954).

Having found that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, on and after February 25, 1980, by failing and refusing to respond to the Union's bargaining proposals and by withdrawing recognition of the Union as the exclusive bargaining representative of the employees in the appropriate unit, I recommend that Respondent be ordered to bargain in good faith with and recognize the Union as the exclusive representative of its employees in that unit.

In cases where an employer has refused to bargain during the certification year, the Board has normally, in the remedial order, construed the certification year as commencing on the date the employer commences good-faith bargaining. *Eckerd Drugs of Georgia, Inc.*, 248 NLRB 151 (1980); *Regal 8 Inn, supra*. In certain circumstances the Board will merely extend the certification year less the amount of time when the parties engaged in substantial good-faith bargaining. *Deister Concentrator Company, Inc.*, 253 NLRB 358, fn. 2 (1980). When the nature of the employer's bad-faith bargaining requires a full year of bargaining in order to effectuate the policies of the Act, the Board has ordered a full year of bargaining during which no representation or decertification elections can be held despite the fact that the employer's bad-faith bargaining occurred in the last few months of the certification year. *Glomac Plastics, Inc.*, 234 NLRB 1309, fn. 4 (1978). Where an employer has withdrawn recognition from a union during the certification year, and where the union after a substantial period of bargaining sought to induce employees to engage in acts of vandalism against the employer in order to support its bargaining position and thereafter the employees renounced the union, the Board held that it would not entertain the processing of a decertification petition until after the employer commenced good-faith bargaining for a reasonable period of time, but the Board did not extend the certification year for an absolute 12-month period. *Lee Office Equipment, supra*.

In this case, the Union did not engage in misconduct during a period of bargaining. Furthermore, bargaining herein did not effectively commence, because Respondent withdrew recognition based on an employees' petition that had been initiated prior to the certification. Clearly, Respondent was aware of the petition prior to any bargaining demand, and was therefore not of a mind to engage in any bargaining from the outset of the certification year. Under these circumstances, I recommend that the full certification year commence on the date that Respondent commences to bargain in good faith, and that during such time no question concerning the Union's majority status can be raised.

CONCLUSIONS OF LAW

1. The Respondent, Lexington Cartage Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All truckdrivers employed by Respondent at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since October 30, 1979, the Union has been and is the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. On and after February 25, 1980, by failing to respond to the Union's bargaining proposals and by withdrawing recognition of the Union as the exclusive collective-bargaining representative of the employees of Respondent in the aforesaid unit, Respondent has failed and refused, and is failing and refusing, to bargain collectively in good faith with the Union as the representative of its employees, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁸

The Respondent, Lexington Cartage Company, Inc., Lexington, Kentucky, its officers, agents, successors, and assigns, shall:

⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with Teamsters Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following bargaining unit:

All truck drivers employed by the Respondent at its Lexington, Kentucky facility, excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain in good faith with the above-named labor organization as the exclusive representative of all employees in the above-described unit.

(b) Post at its Lexington, Kentucky, facility copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violations have been found are hereby dismissed.

⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."